

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v

Docket No. 121189

THOMAS DAVID CRESS

Defendant-Appellee.

BRIEF ON APPEAL--APPELLEE

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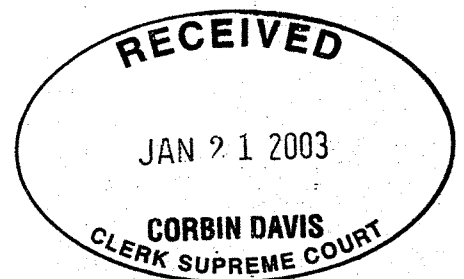


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COUNTERSTATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee Thomas David Cress agrees that this Court has jurisdiction to hear this appeal from the Court of Appeals' decision.

COUNTERSTATEMENT OF QUESTION PRESENTED

- I. Did The Court of Appeals Correctly Order a New Trial Given Michael Ronning's Confession and the Circumstances Which Corroborate It?**

Court of Appeals answers, "Yes."

Defendant-Appellee answers, "Yes."

COUNTERSTATEMENT OF FACTS

The defendant-appellee, Thomas David Cress, was convicted of felony murder in 1985 in Calhoun County Circuit Court. On February 26, 2002, the Court of Appeals reversed the trial court's denial of Mr. Cress' motion for new trial, concluding, in the words of Judge Hilda Gage, "We can scarcely imagine a scenario that would constitute a more appropriate basis for an order granting a new trial." Court of Appeals' Opinion (55a).

Mr. Cress relies on the facts set forth accurately and exhaustively in the Court of Appeals' February 26, 2002, opinion (30a-55a). For purposes of completeness in this extremely fact-intensive case, however, Mr. Cress sets forth the following additional facts about the 1985 trial in this Counterstatement of Facts. Mr. Cress also sets forth many more facts about the post-trial developments in this case in the Argument portion of this brief.

The Key Evidence From the 1985 Trial

Patricia Rosansky was last seen alive walking toward Battle Creek Central High School on the morning of February 3, 1983 (30a). Two months later, on April 6, 1983, two men found her badly decomposed body in a wooded area (30a). More than a year after that, the police arrested Mr. Cress.

The circuit court summarized the 1985 trial evidence in its 1997 Opinion: "There was absolutely no physical evidence linking the Defendant, Mr. Cress, to this crime. The only evidence connecting him to the crime was the testimony of several witness, including Walter Moore, Candy Cross, and Cindy Leslie, all of whom testified that Mr. Cress has admitted to

each of them his involvement in Ms. Rosansky's murder." Trial Court Opinion Granting New Trial, 12/3/97, at 2 (69a). Accordingly, Mr. Cress shall briefly review the physical evidence from the 1985 trial (all of which was burned in 1992 after the prosecution authorized the State Police to destroy the evidence), the statements against Mr. Cress, and the alibi defense he presented.

The Physical Evidence From the 1985 Trial

As the trial court observed, none of the physical evidence connected Mr. Cress to the crime. In fact, some of the key physical evidence apparently excluded Mr. Cress.

State Police Trooper Harry Zimmerman, a crime scene technician, testified that he found a Kotex sanitary napkin under Ms. Rosansky's body, and he found hairs in her left hand (4b-5b).

Curtis Fluker, a Michigan State Police crime lab serologist, testified that he "did find sperm in the extract from the sanitary napkin." (13b). At the time of Mr. Cress' trial in 1985, there was no way to match sperm to a suspect (14b).

Mr. Fluker also examined the four hairs found in Ms. Rosansky's left hand and concluded that two of the hairs were human pubic hairs, two were human head hairs, and all four hairs appeared to be from a Caucasian (15b).¹ Mr. Fluker concluded that Mr. Cress could not have been the source of the hair because "the hair of the defendant was not similar to the hair from the left hand of the deceased." (18b). Further, Mr. Fluker testified that all of the hair in Ms. Rosansky's left hand "differed" from her known hair samples, but he was not willing to definitely exclude Ms. Rosansky (16b, 19b, 21b). Mr. Fluker confirmed that the two head hairs

¹ Mr. Cress, Ms. Rosansky, and Mr. Ronning are all Caucasian.

in Ms. Rosansky's hand had intact roots (17b, 20b). A defense hair expert, Professor Kenneth Siegesmund, testified that he compared the head hairs from Ms. Rosansky's left hand against Mr. Cress' known hair and Ms. Rosansky's known hair and concluded that "none of these three samples could have come from the same source." (48b).

Two pathologists testified at the trial concerning their autopsy of Ms. Rosansky. Dr. Bader Cassin found only one injury to Ms. Rosansky's skull: on the back left of her skull, he found "a very broad and large depressed fracture opening in the skull. On the back of the neck, in contrast, where the skin was completely intact." (6b). Dr. Cassin found four or five loose pieces of bone that had been knocked out of the fractured area inside the skull itself, and he was able to fit those pieces back into the opening (7b-8b). Dr. Cassin concluded that the fracture could have been produced by one massive blow to the left rear of Ms. Rosansky's skull or several blows to "virtually the same place." (9b-10b).

Dr. Cassin specifically concluded that the single massive skull fracture was produced by blunt force trauma that **"could be the drop of a heavy rock to the head from height of several feet, such as 6 feet,** or it could be a swing with perhaps a smaller object, or even a small rod. But it would have to be delivered with considerable force to produce that injury." (115a; emphasis added). He concluded that "death was caused by a blow to the back of the head[.]" (11b). Dr. William Walters, the Calhoun County Medical Examiner, performed an independent autopsy and agreed with Dr. Cassin that Ms. Rosansky's skull fracture was caused by "one massive blow or several submassive blows." (137b-138a).

Dr. Cassin found a bruise on the back of Ms. Rosansky's neck that he believed occurred before the massive skull fracture (116a-118a). He also found injuries suggestive of sexual penetration of the anus (126a).

Dr. Cassin testified that he also observed bruises on the back of Ms. Rosansky's hands that he believed were defensive wounds (121a). By contrast, Dr. Walters testified that he observed no external injuries other than the massive skull fracture (137a-138a).

Trial Testimony Concerning Mr. Cress' Alleged Statements

As the circuit court observed 12 years later, the only evidence against Mr. Cress was the testimony of several witnesses who claimed that Mr. Cress had admitting killing Ms. Rosansky. After Ms. Rosansky's body was found, the local media heavily publicized the investigation, and a reward was offered for information leading to an arrest.

As the circuit court noted, the three primary witnesses against Mr. Cress were Cindy Leslie, her sister, Candy Moore, and Mrs. Moore's incarcerated husband, Walter Moore. Ms. Leslie, Candy Moore and Walter Moore went to the police in January 1984, shortly after a local TV station ran a program offering a \$5000 reward for information leading to an arrest in the Rosansky case (23b, 30b-31b). Ms. Leslie collected the reward money (32b).

Both Ms. Leslie and Walter Moore claimed at trial that Mr. Cress had driven them to the spot where Ms. Rosansky's body had earlier been found (22b, 24b-29b). Detective Marion Bagent testified that Walter Moore and Ms. Leslie later took the police to that spot, which turned out to be **south** of the river, while Ms. Rosansky's body was found **north** of the river several hundred yards away (33b-35b). Walter Moore also told the officer that the area was

littered with cereal boxes, while no such boxes were found near Ms. Rosansky's body (36b-37b). The defense presented several witnesses at trial who testified that Ms. Leslie admitted she was implicating Mr. Cress in order to collect the reward money (38b, 39b).

Mr. Cress' Alibi

At trial, Mr. Cress presented an alibi defense to show that he was working on the morning of February 3, 1983. In addition to Mr. Cress' own testimony, Douglas Moore testified and confirmed that he delivered papers with Mr. Cress from 7 a.m. until mid-afternoon on February 3, 1983 (45b-47b).² Further, the newspaper's circulation manager, Marlan Adkins, testified and introduced business records confirming that Mr. Cress picked up and delivered the papers on the morning of February 3, 1983 (40b-44b).

Additional facts relating to the post-trial developments in this case are set forth in the Argument portion of this brief.

² Linda Momenee, the last person known to have seen Ms. Rosansky alive, had earlier testified that she had walked part of the way to school with Ms. Rosansky shortly before 8:00 a.m. on February 3, 1983 (1b-3b).

SUMMARY OF ARGUMENT

In a thorough and comprehensive opinion, the Court of Appeals carefully examined all of the evidence and concluded that a new trial was warranted because of Michael Ronning's confession. The Court of Appeals' opinion reveals that the court conducted an extremely intensive review of the voluminous evidence in this case, including the photographs, videotapes, and thousands of pages of testimony and documents.

The Court of Appeals correctly found that the trial court clearly erred by mischaracterizing, in a single conclusory paragraph, the voluminous pathological and anthropological evidence in this case, the great weight of which supports Ronning's confession. In contrast to the trial court's cursory and wholly unsupported claim that the evidence of the number of blows contradicted Mr. Ronning's confession, the Court of Appeals conducted an exhaustive review of that evidence and found that the evidence actually supports the confession. At the very least, a reasonable jury could easily find that the physical evidence supports Mr. Ronning's confession.

The Court of Appeals also correctly found that the trial court erred in rejecting Mr. Ronning's credibility while simultaneously refusing to consider the fact that Mr. Ronning passed a prosecution-sponsored polygraph test. In addition, the trial court erred in refusing to consider the fact that Mr. Cress also passed a polygraph test. As the Court of Appeals documented in its opinion, the trial court's stated reasons for doubting Mr. Ronning's credibility, such as his inability to find the precise spot where he left the body 14 years earlier, cannot stand up to the even the most deferential level of scrutiny.

Further, the Court of Appeals was correct to find that the trial court erred in concluding that a reasonable jury could not reach a different outcome even though a veteran homicide detective and his commanding officer, after many years of exhaustive investigation, is firmly convinced that Michael Ronning, and not Thomas Cress, committed this murder. The conclusion that a different outcome is not likely is particularly preposterous since there was never a shred of physical evidence linking Mr. Cress to the crime, Mr. Cress had a solid alibi, the evidence against Mr. Cress consisted entirely of informant testimony, and most or all of those informants have recanted and/or admitted to others that they falsely implicated Mr. Cress for the reward money.

Finally, the Court of Appeals correctly and unanimously agreed that the trial court erred in refusing to consider the fact that the prosecution ordered the destruction of the physical evidence in 1992, thereby preventing DNA testing of the semen and human hairs, several years after Detective Mullen told the Calhoun County Prosecutor that he suspected Mr. Ronning in the crime and several months after Mr. Ronning implicated himself to Detective Mullen. Since the jury at a retrial could permissibly infer that the destroyed evidence would have disfavored the prosecution, the evidence destruction was relevant regardless of whether it was done in bad faith.

ARGUMENT

I. **THE COURT OF APPEALS CORRECTLY ORDERED THE NEW TRIAL IN LIGHT OF MICHAEL RONNING'S CONFESSION AS ANY REASONABLE JURY WOULD REACH A DIFFERENT RESULT ON RETRIAL.**

Introduction and Standard of Review

This case presents the question of whether Mr. Cress will serve the rest of his life in prison without a jury ever being allowed to assess the newly discovered evidence in this case even though: (1) another man, Michael Ronning, has repeatedly confessed, on video and under oath, to the murder for which Mr. Cress was convicted; (2) a veteran police detective and his commanding officer are firmly convinced, after many years of investigation, that Mr. Ronning committed the murder and that Mr. Cress is innocent; (3) Mr. Ronning and Mr. Cress have both passed polygraph examinations; (4) most, but not all, of the pathologists and forensic anthropologists who have examined the victim's body have concluded that Mr. Ronning's confession is consistent with the physical evidence; (5) the primary witnesses against Mr. Cress have recanted; and (6) a jury could permissibly infer that the physical evidence, if tested for DNA, would have exonerated Mr. Cress because the prosecution signed an order to have the evidence burned after the chief prosecutor, by his own admission, learned that the police detective suspected that Mr. Ronning had committed the murder, a fact that the prosecution withheld from Mr. Cress and his lawyers for approximately eight years.

The legal question that a court faces on a motion for new trial is whether a reasonable jury is reasonably likely to reach a different result given the newly discovered evidence. In this

extraordinary case, that answer is self-evident. No reasonable jury could possibly reach the same result given the new evidence that has developed in this case.

This Court must let the Court of Appeals' decision stand to prevent a miscarriage of justice. While the standard of review for a denial of a motion for new trial is abuse of discretion, People v Leonard, 224 Mich App 569, 578 (1997), a decision based on an error of law is a per se abuse of discretion. Koon v United States, 518 US 81, 100 (1996). As the Court of Appeals found, the circuit court committed a per se abuse of discretion by refusing to consider the exculpatory polygraph evidence, as well as the destruction of the evidence. The Court of Appeals was also entirely correct to find that the trial court erred by mischaracterizing the pathological testimony, failing to give any weight to the exculpatory recantation evidence, giving preclusive weight to the fact that Mr. Ronning could not find the exact spot where the body had been dumped 14 years earlier, and, ultimately, by concluding that a reasonable jury was not likely to acquit Mr. Cress on retrial.

**A. THE COURT OF APPEALS CORRECTLY
CONCLUDED THAT A NEW TRIAL IS
REQUIRED.**

The Court of Appeals' Decision

The Court of Appeals issued an opinion on February 26, 2002, ordering a new trial (30a). The majority opinion, authored by Judge Hilda Gage, contains a lengthy and accurate review of the facts and then concludes, in great detail, that the trial court erred in dismissing

Michael Ronning's confession on the basis of the pathological and anthropological evidence.

(38a-43a). As the Court of Appeals found after its review of the record:

Our review of the expert medical testimony regarding the cause of the victim's death and the potential sources of her fatal skull fractures leaves us with the definite and firm conviction that the trial court made a mistake when it found that the expert testimony precluded the possibility that Ronning damaged the victim's skull by dropping a large rock on it. . . . **Four of the five experts who testified, either during defendant's original trial or during the evidentiary hearings, opined that the victim's skull fractures could have resulted from a single massive blow to the back of her head: of these four, Walters and Cassin apparently believed that one blow to the victim's head was at least as likely as two, and Sundick opined that most likely one strike caused the skull damage. Three of the four experts acknowledged that the single blow could have been delivered with a rock.** (42a; emphasis added; citation omitted).

After reviewing in detail other medical and pathological testimony, the Court of Appeals concluded that the trial court had "clearly erred to the extent that it relied on the expert medical testimony to establish that Ronning falsely confessed to murdering the victim." (43a).

The Court of Appeals next concluded that the trial court erred by rejecting Ronning's credibility while declining to consider the fact that he passed a polygraph examination (43a-44a). The Court of Appeals then concluded that the trial court was correct in its first opinion to conclude that the recanting trial witnesses, while not enough standing alone to merit a new trial, were a significant factor when combined with the evidence concerning Michael Ronning in establishing that a different result was probable on retrial (45a). The Court of Appeals next concluded that the trial court erred in dismissing Detective Mullen's extensive investigation that led him to firmly conclude that Michael Ronning, and not Thomas Cress, murdered Patricia Rosansky (45a-47a).

Based on all of these factors, the Court of Appeals concluded that a new trial was required, even without considering the destruction of the evidence:

In light of the trial court's (1) reliance on its miscomprehension of the expert medical testimony regarding the victim's injuries, (2) mistake of law in failing to even address the fact that Ronning passed a polygraph examination, and (3) rejection of Detective Mullen's belief in Ronning's guilt of the victim's murder because of its mischaracterization or misunderstanding of the bases for Mullen's determination, we conclude that the court abused its discretion in denying defendant's motion for relief from judgment and request for new trial. The trial court clearly erred when it found that the newly discovered evidence of Ronning's confession did not make a different result probable on a retrial of defendant. (48a; citations omitted).

Having already concluded that a new trial was required, the Court of Appeals went on to discuss the prosecution's alleged bad faith destruction of the evidence and concluded that the Arizona v Youngblood, 488 U.S. 51 (1988), issue must be litigated to the jury in the context of Mr. Cress' retrial (50a-55a), a conclusion that this Court has rejected since a Youngblood claim is a legal issue to be resolved by the judge in the context of a pretrial motion to dismiss (88a). However, all three judges agreed that the trial judge had erred in refusing to consider the evidence destruction in the context of the motion for new trial because the jury at a retrial could permissibly infer from the circumstances of that evidence destruction that the evidence would have been unfavorable to the prosecution (55a, 57a-58a).

The heart of the Court of Appeals Opinion is its conclusion that, even aside from the fact that the prosecution destroyed the evidence before it could be tested, a reasonable jury was likely to reach a different outcome given that Michael Ronning, a convicted murderer, had confessed to the murder of Patricia Rosansky in a manner that was consistent with the great bulk of the pathological and medical testimony, that he passed a polygraph, that the witnesses who

implicated Mr. Cress in 1985 had largely recanted, and that a veteran police detective, after years of investigation, had concluded that Mr. Cress was innocent and Mr. Ronning was guilty. The Court of Appeals was entirely correct in that assessment.

**1. The Court of Appeals Correctly
Concluded That The Trial Court Erred
By Grossly Mischaracterizing The
Pathological and Medical Evidence.**

In its opinion revoking the grant of new trial, the circuit court, in a single paragraph with no analysis and no explanation, flatly asserted that the expert pathologists and anthropologists "all rebut Mr. Ronning's version of the manner of Ms. Rosansky's death. Opinion, 3/4/99, at 3-4 (80-81a). The trial court concluded that it was convinced "that there were in fact multiple blows to the head and neck of Patricia Rosansky." Opinion, 3/4/99 at 3-4 (80-81a)

In fact, as the Court of Appeals correctly concluded after an exhaustive review of the pathological and anthropological evidence, the great weight of that evidence, including the testimony of both pathologists who performed the autopsy, clearly supported Mr. Ronning's confession. As the Court of Appeals meticulously documented, see Court of Appeals opinion at 9-14 (38-43a), the supposed second blow to Ms. Rosansky's neck almost certainly did not occur. At the very, very least, a reasonable jury could certainly find that the manner of Ms. Rosansky's death was consistent with Mr. Ronning's confession. The circuit court's finding to the contrary is therefore clear error. See Tuttle v Dep't of State Highways, 397 Mich 44, 46 (1976) (defining clear error standard). In comparing the trial court's perfunctory and wholly unexplained conclusion with the Court of Appeal's meticulous examination of the entire record, it is clear that the trial court simply ignored the record.

In this section of the argument, Mr. Cress shall demonstrate that the Court of Appeals' thorough review of the pathological and anthropological evidence was correct and that, therefore, a jury could certainly find that Mr. Ronning killed Ms. Rosansky in the manner he described.

The Pathological Testimony from the 1985 Trial Supported Ronning's Confession

At the trial in 1985, Dr. Bader Cassin testified, consistent with Mr. Ronning's later confession, that he found **only one** injury to Ms. Rosansky's skull: a "very broad and large depressed fracture opening in the skull. **On the back of the neck, in contrast, where the skin was completely intact.**" (6b). Dr. Cassin concluded that the fracture could have been produced by one massive blow to the left rear of Ms. Rosansky's skull or several blows to "virtually the same place" (9b, 10b). Dr. Cassin specifically testified that the single skull fracture could have been produced by **"the drop of a heavy rock to the head from height of several feet, such as 6 feet** or it could be a swing with perhaps a smaller object, or even a small rod" (115a; emphasis added). Dr. William Walters, the Calhoun County Medical Examiner, performed an independent autopsy and agreed with Dr. Cassin that the skull fracture was caused by **"one massive blow** or several submassive blows." (137a-138a; emphasis added). Dr. Cassin also testified at the trial that "It would have been difficult to discover" evidence of strangulation because the tissue had already been manipulated (12b). Although Dr. Cassin testified that he also observed bruises on the back of Ms. Rosansky's hands that he believed were defensive wounds (121a), Dr. Walters testified that he observed no external injuries of any kind other than the massive skull fracture (137a-138a).

The Pathological Evidence at the Reopened Evidentiary Hearing

At the reopened evidentiary hearing fourteen years later, prosecution expert Dr. Norman Sauer testified that he examined Ms. Rosansky's exhumed skeleton in 1998 and discovered that pieces of her fractured skull were missing (150b-152b). Contrary to the trial testimony of Dr. Cassin, who had found no fractures to the back of Ms. Rosansky's neck, Dr. Sauer testified that he believed she had a fracture in the back of her neck (158b-159b). Also contrary to the testimony of both pathologists who had performed autopsies in 1983, Dr. Sauer concluded that Ms. Rosansky suffered two or more blows to her skull (153b-157b).

On cross-examination, however, Dr. Sauer admitted that his ability to determine the number of blows was hampered by the missing skull fragments (160b). Dr. Sauer agreed that Dr. Cassin, who had all the skull fragments when he performed the autopsy in 1983, was in a better position to determine the number of blows (167b-169b, 171b). Dr. Sauer was not even aware that both pathologists who had examined the body in 1983 had independently concluded that there was only one massive blow or several blows to the same spot (161b-163b). Dr. Sauer also did not know that Dr. Cassin had cut open Ms. Rosansky's neck in 1983, thus producing the "wound" that Dr. Sauer thought was caused by an injury (164b-166b). Dr. Sauer was forced to admit that the "fracture" he thought he had found on a neck vertebra could have been a scalpel mark from Dr. Cassin's 1983 autopsy (170b).

Dr. Laurence Simpson, a forensic pathologist, also thought, after examining the exhumed body in 1998, that the "laceration" to the back of Ms. Rosansky's neck was evidence of a separate blow to the base of the skull (281b-282b). Like Dr. Sauer, Dr. Simpson was unaware that Dr. Cassin had not found broken skin on the neck, nor was he aware that Dr. Cassin had

produced the "laceration" during the 1983 autopsy (285b-286b, 289b). **Dr. Simpson was forced to concede that the "fracture" to Ms. Rosansky's neck was actually a blade mark from Dr. Cassin's 1983 autopsy (287b-288b).** Like Dr. Sauer, Dr. Simpson was also forced to concede that the pathologist with all of the skull fragments back in 1983 would have been in a better position to state how many blows there were (290b).

Dr. Bader Cassin himself testified at the reopened hearing. Dr. Cassin, after re-examining his 1983 autopsy, reaffirmed the testimony he gave at trial: **Ms. Rosansky's injuries could have produced by one massive blow on the back of her skull, and he agreed, consistent with Mr. Ronning's confession, that a large rock could have inflicted that blow (344b-345b, 347b, 348b).** Dr. Cassin also agreed that there could have been two blows (346b).

Forensic anthropologist Dr. Robert Sundick examined the exhumed remains in 1998 and found **no injury to Ms. Rosansky's vertebra (387b-388b, 389b).** Dr. Sundick also agreed with Dr. Cassin that, consistent with Mr. Ronning's confession, a heavy rock could have inflicted the massive blow (392b-393b, 394b). Dr. Sundick agreed that, consistent with Mr. Ronning's confession and Dr. Cassin's trial testimony, it was "most likely one blow." (395b; emphasis added).

Finally, as for the claim that Ms. Rosansky suffered defensive wounds to the back of her hand, Dr. Sundick testified, after observing the post-mortem photographs of Ms. Rosansky's badly decomposed body, "that it is difficult to distinguish bruises from discolorations on a body that has decomposed in a way that this one has." (396b, 397b-401b). Dr. Sundick went on to testify that the skeletal evidence did not support a claim that Ms. Rosansky had defensive wounds, and the alleged defensive wounds to which Dr. Cassin had testified easily could have

been caused by discoloration during the two months Ms. Rosansky's body decomposed before it was found (402b-407b).

From this record, it is remarkable indeed that the circuit court claimed in its opinion revoking the grant of new trial that the expert witnesses "all rebut Mr. Ronning's version of the manner of Ms. Rosansky's death." Opinion, 3/4/99 at 4 (81a). **On the contrary, the testimony from both pathologists who performed the two autopsies in 1983 and Dr. Sundick, who examined the exhumed body in 1998, clearly supports Mr. Ronning's confession.** It is true that Dr. Sauer and Dr. Simpson both opined, from their examination of the exhumed bones in 1998, that Ms. Rosansky suffered more than one blow, but both were forced to admit that their opinions were based, at least in part, on a fundamental mistake: they were both unaware that a "wound" and a "fracture" to Ms. Rosansky's neck were actually "inflicted" during Dr. Cassin's 1983 autopsy.

In short, the Court of Appeals was clearly correct after its exhaustive review of the evidence to find that the circuit court committed error in its conclusory and unsupported finding that the pathological and expert testimony contradicted Mr. Ronning's confession. The testimony and expert analysis from the pathologists who performed the autopsies in 1983 and who were, therefore, clearly in the best position to estimate the number and nature of blows was exactly consistent with Mr. Ronning's confession: Ms. Rosansky suffered one blow from a heavy object or multiple blows to the exact same spot. Further, there was simply no evidence contradicting Mr. Ronning's confession that he strangled Ms. Rosansky; there was a bruise found on the back of her neck, but her flesh had decomposed so badly that the pathologists could not determine whether or not she had been strangled (12b).

In this Court, having had its claim that there must have been more than one blow discredited by the Court of Appeals' exhaustive review of the record, the prosecution now primarily relies on the claim that Ms. Rosansky suffered defensive wounds as an alleged contradiction with Mr. Ronning's confession. But the Court of Appeals correctly rejected this claim as well, Court of Appeals Opinion at 14 n 19 (43a), because the expert testimony on this point was completely contradictory. Dr. Cassin believed he observed defensive wounds on the back of Ms. Rosansky's hands (121a), while Dr. Walters found no external injuries of any kind other than the skull fracture (137a-138a). Dr. Sundick testified that the skeletal evidence he would normally expect to find in support of a claim of defensive wound was completely missing and that it would have been extremely difficult to distinguish between a bruise and discoloration given that Ms. Rosansky's corpse spent two months in the elements before it was found (396b-407b).

As the Court of Appeals recognized, the circuit court simply mischaracterized the expert testimony. The court therefore committed clear error in concluding that the physical evidence was inconsistent with Mr. Ronning's confession. In fact, the great weight of that expert testimony affirmatively supported the truth of Mr. Ronning's confession.

Finally, Mr. Cress must observe that it is ironic indeed that the prosecution argues that the conflict in the pathological testimony cuts against a new trial, where the only reason the physical evidence is at all ambiguous as to Mr. Ronning's guilt is because the prosecution allowed all of the evidence to be burned before it could be tested for DNA. For the circuit court to acknowledge that the pathological testimony was conflicting and then resolve that conflict

against Mr. Cress is to reward the prosecution for destroying the evidence before it could be tested, years after the prosecution was on notice that Mr. Ronning was suspected in the murder.

If this Court has any doubt as to what the medical and pathological evidence shows, undersigned counsel simply urges this Court to review the pathological and medical record for itself, as the Court of Appeals did in a very thorough fashion. If this Court conducts the same thorough and balanced review of the pathological and medical evidence as the Court of Appeals did, this Court will see for itself, as the Court of Appeals did, that the pathological and medical evidence largely supports the truth of Michael Ronning's confession. At the very least, a reasonable jury certainly could find that Michael Ronning murdered Ms. Rosansky.

2. **The Court of Appeals Correctly
Concluded That The Trial Court Erred in
Failing to Consider the Polygraph
Evidence.**

The circuit court committed a clear legal error in flatly refusing to consider the fact that both Michael Ronning passed a polygraph examination, **particularly since the court ultimately rejected Michael Ronning's confessions on credibility grounds.**

After ruling that it would not consider the polygraph evidence (362b-365b), Mr. Cress made an offer of proof concerning his polygraph results (365b-366b); Cress Polygraph Report (359b-361b). The defense had already introduced into evidence the results of the police polygraph test that Mr. Ronning had taken (313b-314b, 410b; Ronning Polygraph Report (60b)).

In refusing to consider polygraph evidence, even though both this Court and the Court of Appeals have held that such evidence is admissible in support of a motion for new trial, the

court committed a per se abuse of discretion. In People v Mechura, 205 Mich App 481, 484 (1994), and People v Barbara, 400 Mich 352, 412-413 (1977), this Court and the Court of Appeals held that polygraph test results are admissible in support of a motion for new trial if five criteria are satisfied: "(1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meet with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject." Mechura at 484 (citing Barbara at 412-413).

Mr. Ronning's Polygraph Results

Turning first to Mr. Ronning, **Mr. Ronning passed a prosecution-sponsored polygraph examination, and Mr. Cress later introduced a copy of Mr. Ronning's polygraph report showing that he was found to be truthful when he admitted killing three women in Michigan (313b-314b, 328b, 410b); Ronning Polygraph Report (60b). Mr. Ronning confessed under a deal with the prosecution which required him to pass a polygraph test (132b-133b).**

In particular, Mr. Ronning was asked if he killed three people in Michigan, Mr. Ronning affirmed that he had, and the polygraph examiner concluded "**that Michael A. Ronning was truthful**" in his responses to those questions. Ronning Polygraph Report (60b; emphasis added). Since Mr. Cress introduced these results, Mr. Ronning took the polygraph voluntarily, the polygraph was given pursuant to a deal between Mr. Ronning and the prosecution, the

polygrapher's qualifications were never questioned, and the results went to Mr. Ronning's credibility, the circuit court erred in refusing to consider them.

As the Court of Appeals correctly found, the circuit court's error in refusing to consider Mr. Ronning's polygraph results are manifest **since the court denied the new trial solely on the ground that it found Mr. Ronning incredible.** As discussed below, that finding was, standing alone, an obvious abuse of discretion as it was based primarily on Mr. Ronning's inability to pinpoint a changed crime scene that he had last visited, while high on drugs, fourteen years earlier. For the court to make that finding while simultaneously refusing to consider the fact that Mr. Ronning had passed a polygraph test arranged by the police and the prosecution amounts to a per se abuse of discretion.

It is true, as the amicus curiae for the appellant points out, that polygraph results are not generally admissible during trials. But **polygraph results are obviously considered reliable for use by prosecutors and police agencies, as well as the state and federal government.** To fail to consider the polygraph results in this case would be particularly galling since it was the prosecution that insisted that Mr. Ronning must pass a polygraph test as part of the deal that it made with him. In other words, the prosecution put its faith in a polygraph of Mr. Ronning but now would have this Court ignore that very test when it turned out to exonerate Mr. Cress.

Mr. Cress' Polygraph Results

After the court ruled that it would not consider polygraph results, Mr. Cress made an offer of proof as to his own polygraph (362b-366b). Dr. Frank Horvath, a polygrapher with

over 30 years experience, testified that polygraphs have become more accurate in the past 25 years, and now have an accuracy above 90 % (368b-381b). Dr. Horvath polygraphed Mr. Cress, and asked him whether he had any involvement in the Rosansky murder (367b, 381b-384b). **Mr. Cress denied any involvement in the murder or rape of Ms. Rosansky, and Dr. Horvath concluded that Mr. Cress was truthful** (381b-385b). Dr. Horvath testified that Mr. Cress is the first person he has ever passed who denied a murder for which he or she had been convicted (384b-385b). Dr. Horvath's polygraph report was admitted into evidence under the offer of proof (386b; Cress Polygraph Report; 359b-361b).

Contrary to the Court of Appeals' finding, Mr. Cress' polygraph test results met all of the requirements of Mechura and Barbara: the results were offered by the defendant, the test was voluntary, Dr. Horvath's qualifications are impeccable and unchallenged, the prosecution did not request an independent test, and the results were offered in support of Mr. Cress' general credibility.

Indeed, Mr. Cress' credibility was very relevant because he had testified at his trial and denied involvement in the murder or rape of Ms. Rosansky. He also produced a powerful alibi establishing, through testimony and documentary evidence, that he was working with another man at the time that Ms. Rosansky disappeared (45b-47b, 40b-44b).

While Mr. Cress believes that the Court of Appeals erred in supporting the circuit court's refusal to consider Mr. Cress' polygraph test results, the Court of Appeals was certainly correct in concluding that the trial court erred in refusing to consider Mr. Ronning's polygraph results.

3. **The Court Of Appeals, Unlike The Circuit Court On Reconsideration, Correctly Considered The Evidence That The Witnesses Who Implicated Mr. Cress Had Perjured Themselves.**

In Mechura, 205 Mich App at 483, and Barbara, 400 Mich at 363, both this Court and the Court of Appeals recognized that a new trial may be required if the defense introduces evidence that critical testimony at trial was perjured. That standard was clearly met here as the defense introduced compelling evidence that the key evidence against Mr. Cress was perjured. After finding this evidence to be "significant" in its first opinion granting a new trial, the circuit court inexplicably refused to consider it in its second opinion revoking the grant of new trial. The Court of Appeals was correct, therefore, to conclude that this evidence was significant in conjunction with the other newly discovered evidence, even if it would not justify a new trial standing alone. Court of Appeals Opinion at 15-16 (44-45a).

The circuit court observed in its first opinion granting a new trial, "There was absolutely no physical evidence linking the Defendant, Mr. Cress, to this crime. **The only evidence connecting him to the crime was the testimony of several witnesses, including Walter Moore, Candy Cross, and Cindy Leslie, all of whom testified that Mr. Cress had admitted to each of them his involvement in Ms. Rosansky's murder.**" Opinion, 12/3/97 at 2; (69a; emphasis added).

In fact, as the circuit court found in its first opinion, Mr. Cress introduced evidence that these witnesses, who were related to each other, had given recanting statements. Opinion, 12/3/97 at 3-4 (70-71a). The circuit court initially found this recanting evidence "**significant**

because the jurors at the trial chose to believe Ms. Leslie and Ms. Cross, as well as Walter Moore's testimony." Opinion, 12/3/97 at 4 (71a; emphasis added).

Although, the court stated that it was not convinced "that this evidence standing alone would justify ordering a new trial," Opinion, 12/3/97, at 4 (71a), the court explicitly considered the recantation evidence as supporting its decision:

Considering the fact that at Mr. Cress' trial, there was no physical evidence connecting him to the crime; **that his conviction was based solely upon the statements attributed to him by several prosecution witnesses; that some of those witnesses may have recanted their trial testimony;** and that Mr. Ronning's confession cannot be deemed incredible or unbelievable, I believe that Defendant has met his burden of establishing the four factors listed in the Clark case which are required for granting a new trial. Opinion, 12/3/97 at 7 (74a; emphasis added).

During the reopened evidentiary hearing, the defense introduced much more evidence, including a videotape of Ms. Cross contradicting her trial testimony. In revoking the new trial, however, the circuit court ignored all of the recanting testimony except to state that this ground would not justify granting a new trial. Opinion, 3/4/99 at 2 (79a). In other words, the court inexplicably went from concluding that the recanting testimony was "significant" and was a relevant factor in granting a new trial, Opinion 12/3/97 at 3-4, 7 (70-71a, 74a), to refusing to give the recanting testimony any weight at all in denying a new trial. In failing to give any weight to the recanting testimony, which the court had earlier found to be significant, the circuit court abused its discretion and violated the principles set forth in Barbara and Mechura.

Indeed, there were plenty of reasons to be suspicious of Cindy Leslie, Candy Moore, and Walter Cross even back at the trial in 1985. Both Ms. Leslie and her incarcerated brother-in-law, Walter Moore, claimed at trial that Mr. Cress had driven them to the spot where Ms.

Rosansky's body had been found, but each of them later took a police officer to that spot, which turned out to be **south** of the river, while Ms. Rosansky's body was found **north** of the river (33b-35b). Mr. Moore also claimed that the area was littered with cereal boxes, but no such boxes were found near Ms. Rosansky's body (36b-37b). The defense presented witnesses at trial who testified that Ms. Leslie had admitted she was implicating Mr. Cress in order to collect the reward money (38b, 39b).

At the first evidentiary hearing in 1997, the defense presented Thomas Clark, who testified that Walter Moore called him from jail shortly before the trial and admitted that he, Candy Moore, and Cindy Leslie were falsely implicating Mr. Cress to collect the reward money (117b-123b). Another witness, Curtis Feltner, testified that Cindy Leslie admitted to him after the trial that she had lied about Mr. Cress (124b-125b).

In short, there was substantial evidence presented at the first evidentiary hearing that the witnesses had perjured themselves at trial. Therefore, the circuit court recognized that this testimony was "significant" and was a factor to be considered in its decision to grant a new trial.

At the reopened evidentiary hearing, Mr. Cress introduced even more compelling evidence that the key witnesses had perjured themselves at trial. Detective Mullen conducted a videotaped interview with Candy Cross, in which **Ms. Cross admitted to Detective Mullen that Mr. Cress never told her that he had killed anyone** (304b-306b, 332b). Ms. Cross also stated that she believed that her sister, Ms. Leslie, had implicated Mr. Cress for the reward money (306b-307b, 326b). Consistent with Ms. Cross' videotaped recantation, Thomas Clark testified at the reopened evidentiary hearing and again confirmed that Walter Moore, who had

since committed suicide, called him from prison and admitted that he, Candy Cross, and Cindy Leslie had set up Mr. Cress to collect the reward money (172b-177b).

In summary, Mr. Cress introduced even more evidence at the reopened evidentiary hearing that the key witnesses had committed perjury when they had implicated Mr. Cress in 1985. The court correctly recognized in its first opinion that the recantation evidence was significant and an important factor in the ultimate decision as to whether to grant a new trial. It is inexplicable, and an abuse of discretion, that the court later reversed itself and refused to find it at all significant that the prosecution's evidence against Mr. Cress had evaporated.

Therefore, the Court of Appeals was correct to conclude that the recantation evidence was a significant factor, in conjunction with the other newly discovered evidence, requiring a new trial. Court of Appeals Opinion at 16 (45a).

4. The Court of Appeals Correctly Concluded That The Trial Court Erred In Rejecting Detective Mullen's Investigation And Rejecting Michael Ronning's Confession.

As the Court of Appeals found in its comprehensive Opinion, the circuit court's greatest error was on the ultimate question: whether the evidence discovered after Mr. Cress' conviction probably would produce a different outcome on retrial. See Mechura at 483. As the Court of Appeals concluded, the trial court was able to answer that question in the negative only after (1) mischaracterizing the pathological and expert testimony; (2) refusing to consider the polygraph evidence; (3) refusing to attach any weight to the recantation evidence, and (4) refusing to attach

significant weight to the opinion and investigation of Detective Mullen. Court of Appeals Opinion at 19 (48a).

Even after committing all of those errors, however, the trial court still should have found that a new trial was required because a reasonable jury could certainly find, from Mr. Ronning's confession standing alone, that Mr. Cress is not guilty. Instead, the court concluded that a jury would not reach a different outcome solely because the court no longer believed Mr. Ronning's confession.

As the Court of Appeals correctly explained, the indefensibility of the court's ultimate conclusion is highlighted by the fact that the veteran police detective, Dennis Mullen, who has investigated this case for more than a decade has concluded that Thomas Cress is innocent. Court of Appeals Opinion at 16-18 (45a-47a). **If a veteran homicide detective (not to mention his commanding officer) after years of investigation, is firmly convinced that Michael Ronning, not Mr. Cress, murdered Ms. Rosansky, how could the circuit court rationally hold that a jury would not reach the same conclusion?**

Ronning's Confessions and Detective Mullen's Conclusion That Mr. Ronning Is Guilty

Mr. Ronning came into open court on November 5, 1997, and confessed to the murder of Ms. Rosansky (135b-136b, 141b). He also confessed in an affidavit and in numerous detailed videotaped interviews during which he was aggressively questioned by police and members of the Calhoun County Prosecutor's office (61b-116b). Mr. Ronning, who was convicted of a similar rape-murder in Arkansas in 1986, testified that Mr. Cress had no involvement in the murder of Ms. Rosansky (126b, 135b-136b). He also confessed to similar murders of two other

young women, Maggie Hume and Carrie Evans, both of whom were killed in Calhoun County shortly before or shortly after Ms. Rosansky was murdered (134b). Mr. Ronning confessed under a deal allowing him to serve a life sentence in Michigan if he passed a polygraph test and was convicted of **one or more** murders in Michigan, but since the deal did not require him to admit to any specific murder, he could have obtained that benefit by confessing only to the Hume murder (127b-133b, 141b). In other words, **Mr. Ronning had absolutely no incentive to confess to the murder of Patricia Rosansky since he could have, and would have, received the same deal simply by confessing to murdering Maggie Hume (141b). But Mr. Ronning insisted on confessing to the Rosansky murder because he also committed that one (141b).**

Detective Mullen, a homicide detective with 29 years experience, testified at great length as to his investigation that led him to conclude that Mr. Ronning had murdered Ms. Rosansky. Detective Mullen was initially assigned to investigate the murder of Ms. Hume, who lived directly above Michael Ronning's apartment in Battle Creek at the time of her murder (190b-192b). Detective Mullen learned that Mr. Ronning hurriedly moved out of his apartment and went to stay with Danny Ball in Texas within a day of Ms. Hume's murder (190b-192b). Ms. Hume's body was found in her closet, covered up with debris (195b). Detective Mullen eventually learned from Mr. Ronning's wife that he wore shoes that matched a shoe print found at the point of entry to Ms. Hume's apartment (199b, 215b, 216b-217b).

Detective Mullen contacted Danny Ball in Texas, who revealed that he believed Mr. Ronning had murdered his girlfriend (192b). Texas police confirmed that Mr. Ball's girlfriend had been found in the woods covered with debris, just like Ms. Rosansky and the victim in

Arkansas (193b). Mr. Ronning was also wanted for questioning concerning a murder in Sacramento, California, a state where he had been convicted of a rape even before the Calhoun County murders were committed (194b, 214b).

After his trip to Texas, Mr. Ronning returned to Michigan and later moved to Bellevue, just before another young woman, Carrie Evans, disappeared (196b). Her body was found covered with debris less than two miles from Mr. Ronning's home in Bellevue (196b).

By the late 1980's or early 1990's, Detective Mullen had concluded, from the marked similarities in the three crimes, that Mr. Ronning had probably murdered Ms. Hume, Ms. Evans, and Ms. Rosansky. Thus, Detective Mullen confronted Mr. Ronning during a prison interview in January 1992, and Mr. Ronning indicated that he could, in fact, clear the man who was in prison for the Rosansky murder.

At the reopened evidentiary hearing, **Detective Mullen testified that he firmly believed that Mr. Ronning had, in fact, murdered Ms. Rosansky**, particularly since his confession contained many details that were not public knowledge (222b-257b, 319b-325b). Mr. Ronning specifically confessed to dropping a large rock on the back left side of Ms. Rosansky's head, which matched the massive skull fracture she suffered (219b).

In its first opinion granting the new trial, the circuit court explained:

And finally, there is the testimony at the hearing of Battle Creek Police Detective Dennis Mullen.

Detective Mullen testified that he has been working on this murder case and two others since the 1980's. He stated under oath at the Hearing that he encouraged the Prosecutor's office to issue an arrest warrant against Michael Ronning for the murder of Patricia Rosansky. That testimony clearly indicates that Detective Mullen, based upon his knowledge of the circumstances surrounding Patricia Rosansky's murder and

his subsequent investigation, believes Mr. Ronning's confession is true.

It is obvious that Detective Mullen and the Prosecutor's Office have a difference of opinion concerning the believability of Michael Ronning's confession. That difference simply indicates to this Court that the Ronning confession cannot be summarily dismissed. Ultimately, at a new trial, the jury may believe Mr. Ronning and acquit Thomas Cress. On the other hand, the jury may totally reject Ronning's confession and convict Mr. Cress of murder. Opinion 12/3/97 at 6-7 (73-74a; emphasis added).

In its opinion revoking the grant of new trial, however, the circuit court abruptly changed its tune. Even though the circuit court acknowledged that Detective Mullen was still firmly convinced that Mr. Ronning committed the murder, the court ultimately concluded that "this Court is no longer believes that a different result at a retrial is probable." Opinion, 4/3/99 at 7-9 (84-86a). Once again, it is impossible to understand how the court could conclude that a jury could not find Mr. Cress to be innocent when the experienced officer who has investigated the case for years is firmly convinced that Mr. Cress is, in fact, completely innocent.

The Circuit Court's Stated Reasons for Disbelieving Ronning's Confession

The circuit court, in its opinion revoking the grant of new trial, identified three reasons for disbelieving Mr. Ronning's confession. The first reason was the pathological evidence, the great weight of which, as Mr. Cress and the Court of Appeals have demonstrated, actually supports Mr. Ronning's confession.

The second reason was the testimony of several persons to whom Mr. Ronning denied murdering Ms. Rosansky. Opinion, 4/3/99, at 4-5 (81-82a). What the circuit court neglected to acknowledge was that these witnesses testified that Mr. Ronning, a convicted murderer and

rapist, consistently denied committing any murders, not just the murder of Ms. Rosansky. For example, Randall Cooley testified that Mr. Ronning told him that he had not committed any murders (178b-180b). Mr. Cooley explained that he would not have continued to visit Mr. Ronning if he had admitted committing any murders (181b). However, in a phone call with another family member in early 1998, **Mr. Ronning admitted in graphic detail how he had killed a young woman in Michigan** (182b-184b).

The circuit court wrote that it found the testimony of Mr. Ronning's half-sister, Melissa Meyer, "particularly persuasive." Opinion, 4/3/99 at 4 (81a). Ms. Meyer also testified that Mr. Ronning denied the murders to her, and, like Mr. Cooley, agreed that she would have cut off contact with Mr. Ronning if he had admitted the murders (185b-186b, 188b). Critically, Mr. Ronning also told Ms. Meyer that he had not committed the murder in Arkansas, then abruptly changed his story (187b).

The third witness, Rebecca Berry, Mr. Ronning's sister, testified that her brother is a psychopath, is violent towards women, and is fully capable of murder (355b, 356b-358b). She also confirmed that Mr. Ronning had a severe drug abuse problem in the 1980's (358b). Mr. Ronning told Ms. Berry that he had not committed any murders in Michigan, but he also told her, contrary to the physical evidence, that he had not slashed the throat of Diane Hanley in Arkansas (349b-354b).

Finally, jail inmate Timothy Dixon testified, in exchange for the prosecution's promise to help him obtain early parole, that Mr. Ronning told him that he was fabricating his confessions to the Michigan murders, **but he also claimed that Mr. Ronning told him that he would later prove that he could not have committed the Michigan murders in 1982 and**

1983 because he was already in prison in Arkansas (258b-275b, 276b-279b, 280b). In fact, as Detective Mullen confirmed, Mr. Ronning was in Michigan living near each of the three victims in 1982 and 1983, and he did not go to prison in Arkansas until 1986 (311b). Indeed, the prosecution later conceded that it had found no evidence that Mr. Ronning was out of state at the time of any of the three Michigan murders (408b-409b).

In short, it was not surprising that Mr. Ronning falsely denied committing any murders, not just the Rosansky murder, to his relatives and to his cellmate. It was also clear that Mr. Ronning denied committing any murders, even including the one for which he had been convicted in Arkansas, because he did not want his relatives to stop visiting him.

It is astonishing that the circuit court would rely on Mr. Ronning's demonstrably false statements to his relatives and to his cellmate that he had never murdered anyone to conclude that he did not commit the Rosansky murder. **It is even more astonishing, as discussed above, that the court would reach this conclusion while simultaneously refusing to take into account the fact that he had passed a prosecution-organized polygraph.**

In concluding that Mr. Ronning had not murdered Ms. Rosansky, the circuit court attached the most weight to the fact that Mr. Ronning was unable to find the precise spot near the top of a ravine where Ms. Rosansky's body was found. Opinion, 4/3/99, 5-7 (82-84a). From this failure to locate the crime scene, the circuit court concluded that Mr. Ronning did not murder Ms. Rosansky.

This holding is impossible to fathom as the circuit court had, after viewing the same videotape in 1997, earlier concluded that Mr. Ronning's confession was credible and that

his failure to remember details was understandable. As the circuit court stated in its first opinion granting the new trial:

First, there are portions of Mr. Ronning's statements which do conform to the established facts in this case. Second, although there are parts of his statements which may not be in conformity with the established facts, it must be noted that we are dealing with events which occurred 14 years ago. **Given that lapse of time, it is possible that one's memory of some of the specific details may be sketchy.** Opinion, 12/3/97, at 6 (73a; emphasis added).

In revoking the new trial grant, the circuit court never even attempted to explain how it could reach the exact opposite conclusion on reconsideration of the exact same evidence.

Indeed, in his testimony at the first evidentiary hearing, Mr. Ronning admitted that he inaccurately remembered the crime scene because development had completely changed the area (138b-139b). Detective Mullen later confirmed that Mr. Ronning could not locate the spot where Ms. Rosansky's body had been found, but Mr. Ronning's attention was focused on a church that had been built in the area since the murder (220b). Detective Mullen also confirmed that Mr. Ronning did not remember that the body was found near a river, but the river was not visible from the spot where the body was found (221b, 302b-303b). Detective Mullen testified that he was convinced that Mr. Ronning could not find the spot where the body had been left because he had confused Mr. Ronning by taking him to the scene down a two-track road that did not exist in 1983 (327b).

On the videotape in question, Mr. Ronning explained that he could not remember the crime scene because he was high on drugs at the time of the Rosansky murder. At the reopened evidentiary hearing, Mr. Ronning's sister confirmed that he had a severe drug abuse problem in the 1980's (358b). The circuit court's opinion does not even mention Mr. Ronning's

testimony and his statements on the videotape that he was confused because he was high on drugs when he murdered Ms. Rosansky.

Finally, as the Court of Appeals observed after viewing the videotape, **"We note that on viewing the April 1997 videotaped excursion into the woods we found it somewhat challenging to even locate the ravine, the top of which was covered to a significant extent by fallen trees and overgrowth."** Court of Appeals Opinion at 19 (48a; emphasis added). It was, in short, absurd for the circuit court to reject Mr. Ronning's confession on the ground that he could not find the exact spot where the body had been dumped 14 years earlier at a time when he was high on drugs, where he was taken to that spot via a road that did not exist at the time, where the area had changed significantly from both human construction and natural forces, and where the location was not prominent in any event.

In this Court, the prosecution for the first time makes a brand new argument: there is no chance of a different outcome because Mr. Ronning may refuse to testify at Mr. Cress' trial since the prosecution has reneged on its deal with him. This argument is frivolous. Mr. Ronning has already testified under oath and been subjected to cross-examination, and **he has been subjected to grueling questioning by the prosecution on videotape numerous times.** Ronning Transcribed Statements (61-116b). At Mr. Cress' retrial, Mr. Ronning's prior testimony and his prior videotaped statements are clearly admissible if he refuses to testify. See MRE 804(b)(1), 804(b)(3); Chambers v Mississippi, 410 US 284 (1973) (violation of Due Process Clause to exclude inculpatory statements made by other suspect to murder).

**B. THE TRIAL COURT ALSO ERRED IN
REFUSING TO CONSIDER THE EVIDENCE
DESTRUCTION AS RELEVANT TO THE NEW
TRIAL MOTION.**

The Court of Appeals reached the conclusion that Mr. Cress was entitled to a new trial even before even considering the fact that the prosecution had all of the physical evidence destroyed in 1992, several years after the prosecutor who personally prosecuted Mr. Cress learned that a police detective suspected that Mr. Ronning had committed the murder, and several months after Mr. Ronning implicated himself in the murder. The Court of Appeals went on to hold, however, that the issue of bad faith destruction of evidence should be litigated before the jury during the retrial.

This Court was correct, of course, in holding that the issue of bad faith evidence destruction under Arizona v Youngblood, 488 US 51 (1988), is an issue to be litigated before the trial judge, not the jury, because the remedy for bad faith evidence destruction is dismissal of the charges with prejudice. Accordingly, this Court remanded for an evidentiary hearing on the question of bad faith, and that evidentiary hearing was held on August 7 and August 8, 2002. Several weeks later, the trial court concluded that there was no bad faith, despite the testimony of Detective Mullen, Commander Newman, and Mr. Ronning's Arkansas attorney, Keith Hall, they had each personally informed Prosecutor Jon Sahli that Mr. Ronning had implicated himself in the murder of Patricia Rosansky before the evidence was destroyed on Mr. Sahli's order in 1992.

In its finding of no bad faith, the trial court did not comment on two additional undisputed facts that were developed during the hearing: (1) that a yellow sticky note established

that Mr. Sahli was personally aware on or about May 12, 1992, **two days before he signed the destruction order**, that Mr. Cress had filed an in pro per motion for his trial transcripts so that he could file a 6.500 motion; and (2) that Conrad Sindt, who had personally prosecuted Mr. Cress, testified that Detective Mullen told him in the late 1980's that he believed Mr. Ronning had killed Ms. Rosansky but Mr. Sindt, who was still Prosecutor at the time, did not inform the State Police, Mr. Cress, or his attorneys of this new development.

Regardless of whether there was or was not bad faith, the issue before the Court of Appeals and this Court is not whether the charges should be dismissed; instead, the issue was whether **the trial court erred in refusing to consider the evidence destruction, regardless of bad faith**, because: (1) the jury on retrial could permissibly infer that the destroyed evidence would have been unfavorable to the prosecution; and (2) the prosecution's failure to inform Mr. Cress or his attorneys of the new evidence until after the evidence was destroyed unfairly hampered Mr. Cress from conclusively proving his innocence. Therefore, the fact that the evidence was destroyed after the prosecution indisputably knew that Detective Mullen and Commander Newman suspected Mr. Ronning of Ms. Rosansky's murder and that the prosecution kept Mr. Cress completely in the dark until it was too late to test the evidence is obviously relevant to the likelihood that a jury on retrial will reach a different result even if these facts do not result in a pretrial dismissal for bad faith.

At the beginning of the reopened evidentiary hearing, Mr. Cress objected that the prosecution's destruction of the evidence prevented him from proving Mr. Ronning's confession was reliable by testing the hairs and sperm for DNA (147b-148b). The circuit court, however, twice ruled that the evidence destruction was irrelevant to its decision to grant or deny a new

trial (149b, 309b-310b). All of the judges of the Court of Appeals agreed that this ruling was error. Court of Appeals Opinion at 23, Concurring/Dissenting Opinion at 1 (52a, 56a).

In so ruling, the circuit court committed a per se abuse of discretion. The prosecution's destruction of the evidence, as Detective Dennis Mullen testified, prevented the police and Mr. Cress from obtaining indisputable proof of Mr. Ronning's guilt (312b). Further, the circuit court overlooked the fact that a jury on retrial would be entitled to infer from the timing of the destruction that DNA testing of the evidence would have exonerated Mr. Cress.

As the circuit court observed in initially granting a new trial, "there was no physical evidence connecting [Cress] to the crime [and] his conviction was based solely upon the statements attributed to him by several prosecution witnesses." Opinion, 12/3/97 at 7; 74a). However, until the prosecution had it burned in 1992, there was physical evidence that unquestionably would have linked someone to that crime.

In particular, **semen containing spermatozoa** was found on Ms. Rosansky's sanitary napkin, and **human head hairs, with roots still attached**, were found in her hand (13b, 15b, 17b, 20b). Serologist Curtis Fluker testified at trial that "the hair of the defendant was not similar to the hair from the left hand of the deceased." (18b). Mr. Fluker also testified that all of the hair in Ms. Rosansky's hand "differed" from her known hair samples (16b, 19b, 21b). Kenneth Siegesmund, a professor of anatomy and a "hair expert," agreed with Mr. Fluker that the hairs could not have come from Mr. Cress, and he testified that the hair could not have come from Ms. Rosansky (48b).³

³ In light of the many recent DNA exonerations of defendants who were convicted as the result of "expert" hair testimony, see, e.g. Barry Scheck, Peter Neufeld, & Jim Dwyer, (continued...)

In short, the physical evidence included spermatozoa and human hairs with intact roots, which could not have been tested for DNA in 1985, but could have been tested by 1992. But, in May 1992, shortly after learning from Detective Mullen that Michael Ronning had implicated himself in the murder of Patricia Rosansky, the prosecutor had all of the physical evidence burned.

Many facts concerning the destruction of evidence remain in dispute. However, after the evidentiary hearing held in August 2002, the following facts are indisputable:

(1) **The Calhoun County Prosecutor, Conrad Sindt, who had personally prosecuted Mr. Cress, testified that he was told by Detective Mullen in the late 1980's that Detective Mullen suspected that Mr. Ronning, and not Mr. Cress, had murdered Ms. Rosansky (433b). Mr. Sindt testified that he made no notes of this conversation, did not reopen the investigation, did not notify Mr. Cress or his attorney, apparently did not notify the State Police or urge any other police agency to investigate whether Mr. Cress had been wrongly convicted, and did not have the physical evidence tested for DNA or request that the evidence be preserved for future testing (433b-435b).**

(2) **The Calhoun County Prosecutor's Office and Jon Sahli fully understood the value of DNA testing by 1992, since Mr. Sahli had already drafted a search warrant for Mr. Ronning's blood in 1988 or 1989 for DNA testing in the Maggie Hume murder (414b).**

³(...continued)

Actual Innocence, 208-210, 213-221 (Signet, 2001) (documenting cases in which innocent defendants were convicted as result of expert hair testimony subsequently discredited by DNA testing), undersigned counsel cannot claim in good faith that the hair evidence at trial, though favorable to Mr. Cress, conclusively exculpated him. **But there is no doubt that a DNA test of that same hair, which apparently excluded Mr. Cress, certainly could have conclusively exculpated him.**

(3) Mr. Ronning personally told Detective Mullen in January 1992 that he could clear the man who had been wrongfully convicted of murdering Ms. Rosansky. Detective Mullen prepared a report documenting that Mr. Ronning "insinuated," among other things, "that he was responsible for 6 murders" and "He could clear the man that was in prison for the Rosansky murder." Mullen Report (49-50b). Detective Mullen and Commander Newman each testified that after Detective Mullen's Arkansas prison visit, they both spoke with Mr. Sahli about Mr. Ronning's involvement in the murder of Patricia Rosansky (417b, 421b). Mr. Sahli, of course, denied that any such conversation took place.

(4) On May 8, 1992, (six days before Mr. Sahli signed the evidence destruction order on May 14, 1992) the Calhoun County Prosecutor's Office received Mr. Cress' in pro per motion for trial transcripts in which he explained he was preparing to file a 6.500 motion, and a yellow sticky note attached to that motion established that Mr. Sahli had personal knowledge of this motion on or before May 12, 1992. Cress Motion (51b). Attached to Mr. Cress' motion was a yellow sticky note, written in part by Mr. Sahli's secretary, Shirley Lawcock and dated May 12, 1992, with the notation, "Matt, This is an old murder case. He has been whole route, supreme court, denied. Jon said someone should be there. Conrad tried this guy and convicted him first degree murder." Yellow Sticky Note (57b; emphasis added). Ms. Lawcock confirmed that the "Jon" was Prosecutor Jon Sahli (422b).

(5) On May 14, 1992, Prosecutor Jon Sahli signed an authorization for the State Police to destroy the evidence (58-59b). During that same period of time, Mr. Sahli refused to sign other authorizations to destroy evidence (426b). The State Police Post Commander testified that it would be inappropriate to destroy evidence if questions had been raised about the

defendant's guilt or if the prosecutor knew that the defendant intended to file a new trial motion (427-428b). The State Police carried out the order to destroy the evidence in October 1992 (424b).

(6) On August 22, 1992 (two months before the evidence destruction was carried out), Mr. Ronning's attorney, Detective Mullen, and Commander Newman met with the prosecutors to discuss Mr. Ronning's involvement in several murders, including Rosansky. Mr. Ronning's Arkansas attorney, Keith Hall, came to Battle Creek on August 22, 1992, and met with Mr. Sahli, assistant prosecutor Matt Glaser, and Detective Mullen (411b-412b). At that meeting, Mr. Hall was "certain" that he and the prosecutors discussed the various Michigan murders in which his client was involved, including the murder of Patricia Rosansky (412b). Mr. Hall testified that he was certain the Rosansky murder was discussed in the presence of both Mr. Sahli and Mr. Glaser (412b). Both Detective Mullen and Commander Newman also testified that they were present at the August 22, 1992, meeting with Mr. Hall and that Mr. Ronning's involvement in the murder of Patricia Rosansky and other women was discussed in the presence of Mr. Sahli and Mr. Glaser (418b-419b, 421b). Former Assistant Prosecutor Matt Glaser testified that his boss, Mr. Sahli, was present at the meeting in which Mr. Ronning's various murders were discussed, but Mr. Glaser could not recall whether the name "Patricia Rosansky" came up, but the name would not have meant anything to him if it did come up because he was not familiar with that case (432b). In direct contrast to Mr. Hall, Detective Mullen, Commander Newman, and Mr. Glaser, Jon Sahli testified that he did not arrive at the meeting until after the business had been conducted and Detective Mullen had already left (429b-430b).

Mr. Cress firmly believes that this record clearly establishes bad faith. On remand, the trial court ruled that it did not amount to bad faith because the trial credited Mr. Sahli's denials that anyone ever told him that Mr. Ronning was suspected in the murder of Ms. Rosansky. Even if this finding were not clearly erroneous, **bad faith must be measured by the knowledge of the prosecutor's office, not an individual prosecutor.** Cf Youngblood, 488 US at 56 n * ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.") (emphasis added).

Here, by Conrad Sindt's own testimony, it is completely undisputed that the prosecutor's office knew that Mr. Ronning was suspected of murdering Ms. Rosansky even when Mr. Sindt was still prosecutor. It is, of course, black-letter law that knowledge of anyone in the prosecutor's office is imputed to the entire office for purposes of the Due Process Clause. Santobello v New York, 404 US 257, 262 (1971) ("The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' or has done"). The prosecution burned the evidence, including a sperm-stained sanitary pad and human hairs, having known for years that Michael Ronning was suspected in the murder of Patricia Rosansky.

After Conrad Sindt left office, there is very ample evidence in the record from the testimony of Detective Mullen, Commander Nemwan and Arkansas attorney Keith Hall that Jon Sahli and Matt Glaser were both personally informed, before the evidence was destroyed, that Mr. Ronning had implicated himself in the murder of Patricia Rosansky. In addition, Detective Mullen's police reports confirm his testimony that the Calhoun County Prosecutor's Office was informed.

Even if all of this did not rise to the level of bad faith within the meaning of Youngblood, however, the evidence destruction is still relevant to the new trial motion because the jury on retrial would still be allowed to infer that the evidence would have favored Mr. Cress. Indeed, in Youngblood, the Court concluded that Mr. Youngblood suffered no Due Process Clause violation when the police innocently destroyed the evidence even before Mr. Youngblood was a suspect, but the jury was instructed that it could "infer that the true fact is against the State's interest" because of the evidence destruction. Id., 488 US at 54 (emphasis added). Even if the defendant does not obtain a jury instruction, the Court stressed that a defendant "is free to argue to the finder of fact that a breathalyzer test might have been exculpatory[.]" even if the police have no obligation to perform such a test. Id. at 59.

Michigan law, in both civil and criminal cases, specifically recognizes that a litigant is entitled to an adverse inference instruction or, at the very least, to argue to the jury that it should infer that destroyed evidence would have disfavored the party that destroyed it, even if the destruction is unintentional. See Lagalo v Allied Corp, 233 Mich App 514, 521 (1999) (litigant entitled to permissive inference jury instruction in absence of claim of intentional destruction); People v Lytal, 119 Mich App 562, 575 (1982) (evidence of defendant's spoliation of evidence relevant and admissible). Even if a criminal defendant, unlike the defendant in Youngblood, does not obtain an adverse inference jury instruction, he is still entitled to argue to the jury that the circumstances surrounding the evidence destruction should lead the jury to conclude that the evidence would have disfavored the prosecution. Youngblood, 488 U.S. at 59; see also Patterson v State, 741 A2d 1119, 1124-1126 (Md 1999) (defendant entitled to argue evidence destruction to jury even if not entitled to adverse inference instruction).

At a retrial, the jury will hear the testimony of Detective Mullen, Commander Newman, and Mr. Hall that they repeatedly informed prosecutors Conrad Sindt, Jon Sahli, and Matt Glaser, that Mr. Ronning was implicated in the murder of Ms. Rosansky before the evidence was destroyed. The jury will also presumably hear from former prosecutor Sindt himself that he knew that Detective Mullen suspected Mr. Ronning in the late 1980's. The jury will also learn that Mr. Sahli signed the evidence destruction order days after receiving a motion from Mr. Cress in which he indicated he was about to file a motion for new trial.

After hearing all of this testimony, the jury will certainly be entitled, if not compelled, to infer that the evidence destroyed would have been unfavorable to the prosecution, and Mr. Cress will certainly be entitled to argue this point to the jury, as Larry Youngblood did. Therefore, the Court of Appeals was certainly correct to find that the evidence destruction issue was relevant to Mr. Cress' motion for new trial, even though the Court of Appeals erred in ruling that the Youngblood Due Process Clause issue should be decided by the jury.

Summary

Of course, as the circuit court recognized in its first opinion granting a new trial, a jury could conceivably conclude on retrial that Detective Mullen and Commander Newman are wrong, that Mr. Ronning falsely confessed to the Rosansky murder, and that Mr. Cress, despite the strength of his alibi and the recantation of the key witnesses against him, did commit the murder. Anything could conceivably happen on retrial.

But the question that the Court of Appeals answered is whether it is enough for a new trial that a convicted murderer and rapist, who lived in the area when three young women

disappeared, has confessed to the murder of Patricia Rosansky, that he passed a polygraph test (as did Mr. Cress), that a veteran police detective after a multi-year investigation is firmly convinced that Mr. Ronning is guilty, and that the main witnesses against Mr. Cress have recanted.

To ask this question is to answer it. To deny a jury a chance to reassess the case against Mr. Cress in light of this new evidence would amount to an act of profound judicial disrespect to the judgment and good sense of the people of this State who may be called upon to serve on that jury. As Judge Gage concluded for the Court of Appeals:

We can scarcely imagine a scenario that would constitute a more appropriate basis for an order granting a new trial. As the trial court noted in its initial opinion granting defendant a new trial, no physical evidence connected defendant to the victim's murder and no eyewitnesses observed any involvement by defendant in the victim's murder. Ronning's subsequent confession, containing many consistencies with the existing evidence of the victim's murder and believed by Mullen after his extensive investigation, the ignored results of Ronning's polygraph, the recantations of several prosecution witnesses and the possible bad faith destruction of physical evidence that might conclusively have determined the guilt or innocence of defendant or Ronning, all weigh heavily in favor of our decision to reverse the trial court's order denying defendant's request for a new trial. To refuse defendant a new trial under these circumstances, from which "it appears to the [C]ourt that justice has not been done," MCL 770.1, would represent a miscarriage of justice. MCR 6.431(B). We emphasize that we neither harbor nor intend to express any convictions regarding the ultimate guilt or innocence of defendant or Ronning, but that under the circumstances that have developed since defendant's original trial he is entitled to have a jury consider anew his alleged commission of the victim's murder. (Court of Appeals Opinion at 26 (55a; emphasis added)).

The Court of Appeals was correct: by any standard of law and justice, Thomas Cress is entitled to a new trial.


CONCLUSION

THEREFORE, Defendant-Appellee Thomas David Cress respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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BY: _____


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